Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

ERLAND EARL BARTANEN, Petitioner,	)	No. 78-1804
-vs-	)	
STATE OF ARIZONA, Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GREG A. McCARTHY
Assistant Attorney
General

State Capitol Building
Phoenix, Arizona 85007

Attorneys for RESPONDENT

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Attorneys for RESPONDENT

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Respondent asks this Court to deny petitioner's Petition for Writ of Certiorari for the reasons expressed below.

STATUTORY AUTHORITY

Ariz.Rev.Stat.Ann. § 13-531.01 provides:

> In this article, unless the context otherwise requires:
>
> 1. "Item" includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device,

recording, transcription or other similar items.

2. An item is obscene within the meaning of this article when:

(a) the average person, applying contemporary state standards would find that the item, taken as a whole, appeals to the prurient interest; and

(b) the item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and

(c) the item taken as a whole, lacks serious literary, artistic, political or scientific value.

. . .

10. "Sexual activity" means:

(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

Ariz.Rev.Stat.Ann. § 13-532 provides:

> A. A person is guilty of a crime who, knowingly:
>
> 1. Prints, copies, manufactures, prepares, produces, or reproduces any obscene item for purposes of sale or commercial distribution.
>
> 2. Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item, or offers to do any such things.
>
> 3. Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item.

Ariz.Rev.Stat.Ann. § 13-1452 provides:

> If the grounds on which the warrant was issued are controverted, the magistrate shall proceed to take testimony relative thereto. The testimony given by each witness shall be reduced to writing and certified by the magistrate. If it appears that the property taken is not the same as that described in the warrant, or that probable cause does not exist for believing the

> items were subject to seizure, the magistrate shall cause the property to be restored to the person from whom it was taken, provided that the property is not such that its possession would constitute a criminal offense.

ARGUMENT

THE ISSUANCE OF THE WARRANT WAS SUPPORTED BY A SHOWING OF PROBABLE CAUSE.

Petitioner has failed to present to this Court any good reason for granting his petition. He is not contending that the state court has decided a federal question not heretofore determined by this Court. And, his claim that the state court wrongly decided a federal question is not pursuasive. Rule 19, Rules of the United States Supreme Court.

On September 30, 1976, an officer of the Phoenix Police Department presented to a Phoenix City Magistrate an affidavit alleging probable cause to believe that on

that same date five obscene films were being shown at the Owl Bookstore, located in Phoenix, Arizona, in violation of Ariz.Rev.Stat.Ann. § 13-532. (This affidavit is reproduced in petitioner's Petition for Writ of Certiorari.) Subsequently, on this same day, that magistrate went to the Owl Bookstore, and personally viewed the films identified in the affidavit. Later this day, on the bases of the affidavit and his personal observations, the magistrate issued a search warrant authorizing the seizure of these films. Still on September 30, 1976, the warrant was executed, and the films were seized.

In the instant case, the films were seized in full compliance with the procedures set forth in Heller v. New York, 413 U.S. 483 (1973). In that case, the film in question was personally viewed

by a judge. Following his viewing of the film, the judge signed and issued a search warrant for the seizure of the film. The film was subsequently seized. This Court held that, since the defendant following the seizure could have obtained a prompt judicial determination of the obscenity issue, the procedure followed was constitutionally proper. The facts in the instant case are comparable. The magistrate viewed the films to be seized prior to the issuance of the warrant. Further, under Ariz.Rev.Stat.Ann. § 13-1452, petitioner could have obtained a prompt judicial determination of the validity of the seizure.

Even putting aside the judge's observations, so that the sole basis for issuance of the warrant becomes the affidavit, still the warrant was properly issued. The test for determining

obscenity was delineated in Miller v. California, 413 U.S. 18 (1973) as follows:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> 413 U.S. 15, 24 (1973) (citations omitted).

Ariz.Rev.Stat.Ann. § 13-531.01(2) in defining obscenity mirrors the Miller formulation. Respondent submits that the affidavit contained sufficient facts to allow the magistrate to determine that there was probable cause to believe that all three prongs of this test were met. As the affidavit reflects, each film

within a short period portrays a wide variety of specified sexual activity of the sort which might aptly be characterized as "hard core." Such an affidavit satisfies prevailing constitutional standards. In weighing the sufficiency of an affidavit, this Court in Spinelli v. United States, 393 U.S. 410 (1969) stated:

> "In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause . . .; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense; and that their determination of probable cause should be paid great deference by reviewing courts."
>
> 393 U.S. at 419 (citations omitted).

In Brinegar v. United States, 388 U.S. 160 (1949) this Court stated:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."
>
> 388 U.S. at 175.

Furthermore, in Carroll v. United States, 267 U.S. 132 (1925), this Court stated that probable cause exists where the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed. The affidavit in this case as to each film raises a reasonable probability of obscenity

because of (1) the great number and variety of acts involved, (2) the extreme, "hard core" nature of the acts described, and (3) the short period in which the occurrence of all these acts is compressed.

The cases cited by petitioner are distinguishable from the instant case. In contrast to the case now before the Court, in Marcus v. Search Warrants, 367 U.S. 717 (1961), the officer's affidavit amounted to no more than his avowal that the items to be seized were obscene. Also, in that case, the judge did not view the allegedly obscene materials before issuing the warrant. Further, in Marcus, there was a mass seizure of materials for purposes of immediate destruction, whereas in the instant case items were selectively seized for evidentiary purposes. For similar reasons, petitioner's reference to Lee Art Theatre v. Virginia, 392 U.S. 636 (1968),

is inappropriate. In that case, the affidavit stated only the titles of the films to be seized, and that the officers had determined from personal observation that the films were obscene. The affidavit in that case contained no factual details, as opposed to the affidavit in our case. Roaden v. Kentucky, 413 U.S. 496 (1973), cited by petitioner, is even further afield. That case involves a warrantless seizure of a film based on nothing other than a sheriff's conclusion that the film as viewed by him was obscene.

Also, the conflict which petitioner finds in the cases does not exist. In United States v. Pryba, 507 F.2d 391 (D.C. Cir. 1974), the affidavit specifically described the sexual activity purportedly portrayed in the films to be seized. Further, the circumstances under which the

package of obscene films was discovered suggested that it contained illicit materials. In United States v. Bush, 582 F.2d 1016 (5th Cir. 1978), the affidavit contained an abundance of detailed information regarding the contents of the films to be seized. Attached to the affidavit were film covers removed from the film boxes, one of which contained a specific description of the film's contents. Again, too, the circumstances of discovery indicated that illicit materials were to be found. The affidavit under consideration in United States v. Tupler, 564 F.2d 1294 (9th Cir. 1977), contained a much weaker showing of probable cause. At any rate, even were some inconsistency in the cases to be granted, petitioner's petition should still be denied. There is no disagreement in the cases over what the proper

constitutional standards are. Any divergence in results stems only from subtle factual differences, and varying emphasis in the application of agreed upon principles.

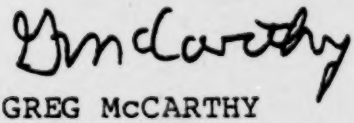
CONCLUSION

For all of these reasons, petitioner's petition should be denied.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



GREG McCARTHY
Assistant Attorney
General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GREG A. McCARTHY, being first duly sworn upon oath, deposes and says:

That he served petitioner in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI; and also served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

BERNARD BERKMAN
Attorney at Law
2121 Illuminating Bldg.
55 Public Square
Cleveland, Ohio 44113

ERLAND EARL BARTANEN
%Bernard Berkman
Attorney at Law

this 29th day of June, 1979.

Greg McCarthy
GREG A. McCARTHY

SUBSCRIBED AND SWORN to before me this 29th day of June, 1979.

Elizabeth J. Lender
NOTARY PUBLIC

My Commission Expires:
July 17, 1982